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No. 86-512

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES WILLIAM HANKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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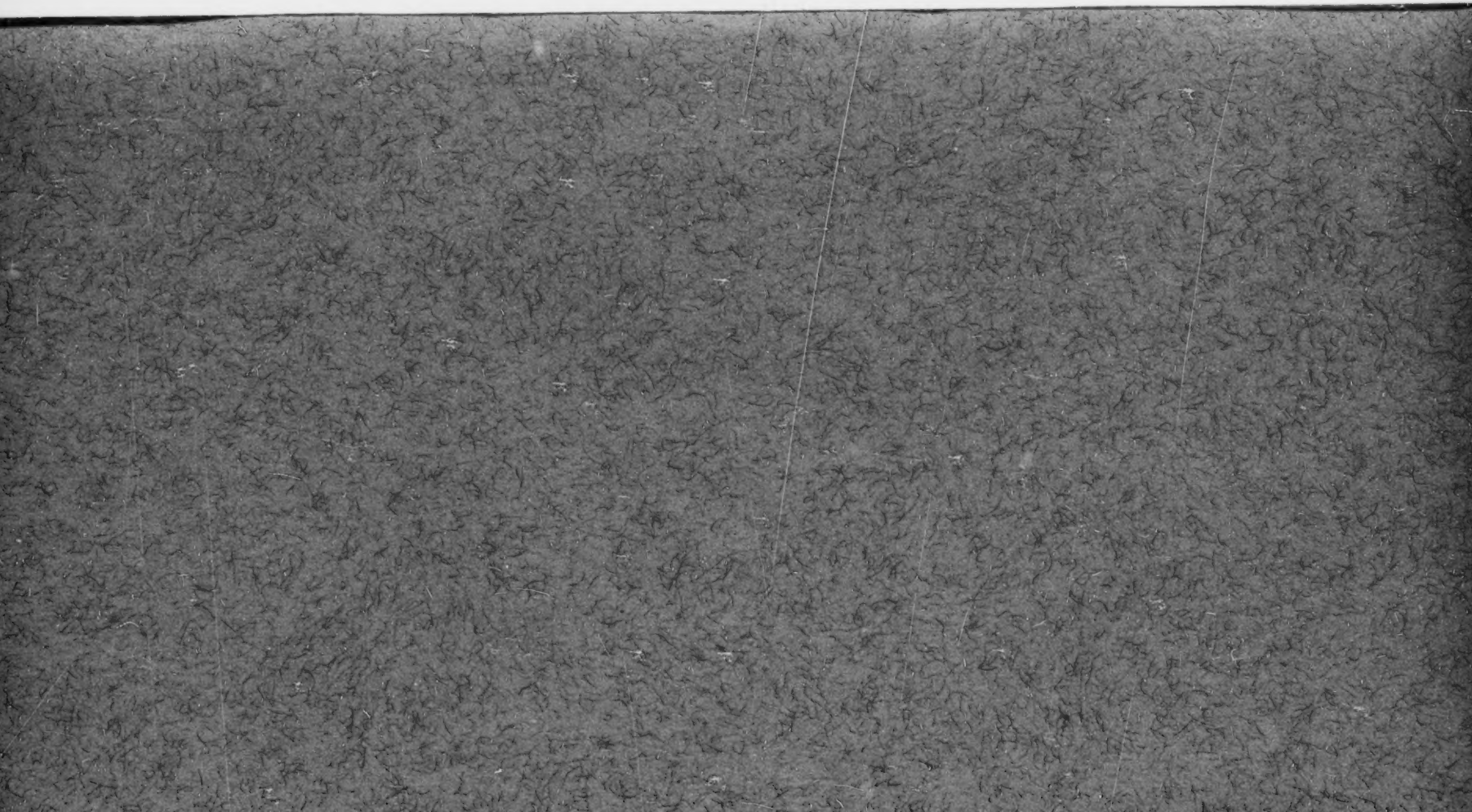

QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by a police officer's search of a sealed envelope when the envelope was not addressed to petitioner and petitioner disclaimed any interest in the envelope or its contents.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-27a) and the order of the district court (Pet. App. 19a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1986, and a petition for rehearing was denied on July 29, 1986 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on September 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 10, 1985, a two-count indictment was returned against petitioner in the United States District Court for the Western District of North Carolina. The indictment charged petitioner with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and interstate travel to promote an unlawful activity, in violation of 18 U.S.C. 1952(a)(3). After the denial of his motion to suppress, petitioner entered a conditional guilty plea to the distribution count in return for the dismissal of the Travel Act count. See C.A. App. 31-33.[1] Petitioner was sentenced to five years in prison, a three-year special parole term, and a $50 special assessment (C.A. App. 38).

The pertinent facts are set out in the magistrate's report (Pet. App. 2a-8a), which was adopted by the district court (*id.* at 19a-21a). On January 17, 1985, Agent J.A. Davis of the North Carolina State Bureau of Investigation was observing passengers arriving in Charlotte, North Carolina, on a flight from Miami, Florida. Agent Davis's attention was drawn to petitioner, who matched a number of the characteristics in the drug courier profile—petitioner was young, he was casually dressed, he carried a small suitcase, and he was one of the last passengers to leave the plane. Learning that petitioner was taking a connecting flight to Richmond, Virginia, Agent Davis became more suspicious because he had received information from the Drug Enforcement Administration indicating an increased use of commercial air travel to transport drugs from Miami to Richmond and Norfolk,

[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

and because he had recently arrested a number of drug couriers traveling through Charlotte on their way to the Richmond-Norfolk area. *Id.* at 2a-3a.

Agent Davis preceded petitioner to the departure gate for the Richmond flight. When petitioner arrived at the gate, Agent Davis was able to look at petitioner's ticket, which was issued in the name of Anderson; Davis observed that the ticket had been purchased with cash and that petitioner did not have any checked luggage. Pet. App. 4a. As petitioner headed away from the gate toward the concourse, Davis approached him, displayed his credentials, and asked if petitioner "would * * * mind speaking with [him] for a minute" (C.A. App. 46). Petitioner agreed to do so. Davis then explained that he was conducting a narcotics investigation, but he assured petitioner that he was not under arrest. Petitioner replied that he knew he was not under arrest because he had done nothing wrong. At Davis's request, petitioner produced his airline ticket, which confirmed the information that Davis had learned at the departure gate. Davis then asked if petitioner had any other identification; petitioner replied that he did not. In response to further questioning, petitioner said that he was a disabled veteran on his way to spend a few days with his daughters in Richmond. Pet. App. 4a-5a.

Agent Davis stated that he would like "to further seek [petitioner's] cooperation" and asked him to consent to a search of his person and the bag he was carrying (J.A. 48). Davis told petitioner that he had the right to refuse the search request. Nonetheless, petitioner consented to the search. When petitioner said that he would like the search to be conducted in a more private location, Davis and petitioner moved

into a construction area where they were not readily visible to the public. A patdown search of petitioner revealed nothing suspicious. Agent Davis then proceeded to open petitioner's carry-on bag. Inside the bag, Davis found a sealed 11″ x 16″ brown envelope addressed to a Ray or Randy Coates at a street address in Richmond. The return addressee was Allen Gruin of Fort Lauderdale, Florida. The magistrate found that "[w]hen Davis picked up the envelope, he could feel a powdery substance with some lumps inside the envelope. Based upon his training and experience, Davis concluded that the envelope contained cocaine." Pet. App. 6a (citations omitted).

When Agent Davis asked petitioner about the contents of the envelope, petitioner replied that he did not know what was in the envelope because it did not belong to him. Petitioner said that he had been asked by a man he met in a bar the previous night to deliver the package to Richmond; petitioner asserted that he did not know the man who had given him the package or either of the persons to whom the package was addressed. Pet. App. 7a.

Agent Davis asked petitioner how he was going to locate the addressees. When petitioner failed to answer, Davis stated that he was going to open the envelope. Petitioner said that he was not sure he could let Davis open the envelope because it did not belong to him. Petitioner then asked if he could use the phone. Pet. App. 7a. Davis said, "You can make a phone call. You're not under arrest" (C.A. App. 50). As petitioner placed his call, Agent Davis moved closer to the telephone and heard petitioner say, "I've got to talk to Ed. I've got a problem at the airport" (C.A. App. 51). At that point, Agent Davis stated that he would "solve" petitioner's problem, and he

opened the envelope. The envelope contained a powdery substance that Davis concluded was cocaine. Davis then placed petitioner under arrest. Subsequent tests disclosed that the substance in the envelope was cocaine. Pet. App. 8a.

2. Petitioner filed a motion to suppress the evidence uncovered by Agent Davis. The district court referred the motion to a magistrate, who held a hearing and recommended that the motion be denied. The district court adopted the magistrate's findings of fact and conclusions of law and, accordingly, denied the motion. Pet. App. 19a-21a. The magistrate found that Agent Davis's initial contact with petitioner was "consensual and did not amount to a seizure under the Fourth Amendment" (*id.* at 10a). She further found that petitioner voluntarily consented to the search of his person and his briefcase (*id.* at 13a-14a).

Turning to the search of the sealed envelope, the magistrate observed that "the burden is upon the proponent of a suppression motion to establish that his legitimate expectation of privacy has been violated by the challenged search" (Pet. App. 15a). She observed that petitioner "was neither the sender nor the addressee shown on the envelope; moreover, he specifically disavowed ownership of the envelope or any knowledge of its contents" (*ibid.*). Petitioner's disclaimer of any interest in the envelope gave Agent Davis grounds for believing that he would not violate petitioner's privacy interests by opening the envelope (*id.* at 15a-16a). The magistrate further concluded that at the point that petitioner become evasive about Davis's request to search the envelope, Davis "had abundant probable cause to arrest [petitioner] and the right to search the envelope under

the 'search-incident-to-arrest exception' to the warrant requirement" (*id.* at 16a-17a).

3. The court of appeals unanimously affirmed petitioner's conviction (Pet. App. 22a-27a). The court first rejected petitioner's challenge to the magistrate's findings of fact (*id.* at 24a-25a). It next concluded that petitioner lacked standing to challenge Agent Davis's search of the envelope, because he did not have a reasonable expectation of privacy in the contents of the envelope. The court found that the evidence did not "support a finding of a contract of bailment, either express or implied," noting that petitioner did not receive any consideration for carrying the package to Richmond (*id.* at 26a). "Such a gratuitous undertaking," the court stated, "does not support a finding of a reasonable expectation of privacy in the envelope" (*ibid.*).[2]

The court of appeals also concluded that the search of the envelope could be upheld as a search incident to arrest. It noted that "the opening of the envelope and the placing of [petitioner] under arrest were essentially simultaneous operations" (Pet. App. 27a). Thus, "[t]he fact pattern disclosed in the [transcript of the suppression hearing] simply negates the argument that the opening of the parcel was not incident to the arrest itself" (*ibid.*).

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[2] The court of appeals upheld the magistrate's conclusion that the encounter between petitioner and Agent Davis was consensual (Pet. App. 26a-27a).

ARGUMENT

Petitioner does not dispute the conclusions of the courts below (see Pet. App. 9a-14a, 26a-27a) that his initial encounter with Agent Davis was consensual and that he voluntarily consented to the search of his carry-on bag. Petitioner contends, however, that the warrantless search of the sealed envelope found inside his carry-on bag was improper. The decision of the court below rejecting that claim is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. The courts below properly found (Pet. App. 15a-16a, 25a-26a) that petitioner lacked standing to challenge the search of the envelope because he had no legitimate expectation of privacy in the envelope.[3] It is beyond question that "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search" (*Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978)). The defendant must show "not only that the search * * * was illegal, but also that he had a legitimate expectation of privacy in [the area or item that was searched]." *Rawlings* v.

[3] Petitioner contends (Pet. 16-18) that the magistrate's factual findings with respect to the Fourth Amendment "standing" issue were clearly erroneous. Those findings, however, were adopted by the district court (Pet. App. 19a-21a) and affirmed by the court of appeals. Indeed, the court of appeals expressly found after a "[c]areful review" that the magistrate's "findings of fact, when compared with the transcript [of the suppression hearing], represent a thorough and balanced statement of the material evidence which was presented * * *" (*id.* at 24a-25a). These concurrent factual determinations of the courts below do no merit further review by this Court.

Kentucky, 448 U.S. 98, 104 (1980); see also *Rakas* v. *Illinois*, 439 U.S. at 140, 143. And if the defendant's allegations regarding the requisite privacy interest are contested, the defendant is "put to [his] proof on * * * [the] issue" (*Rakas*, 439 U.S. at 131 n.1). Petitioner failed to carry that burden here.

A legitimate expectation of privacy does not arise merely because a defendant is in possession of a package when the package is seized by the police. This Court has specifically "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched" (*United States* v. *Salvucci*, 448 U.S. 83, 92 (1980)). Thus, "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation." *Id.* at 91; see also *Rawlings* v. *Kentucky*, 448 U.S. at 105-106.

In circumstances such as those presented here, where the defendant disclaims any property interest in the container found in his possession, the courts of appeals consistently have concluded that the defendant lacks standing to challenge a search of the container. For Fourth Amendment "standing" purposes, a defendant's disclaimer of interest in property seized is "analogous to abandonment" of the property itself. *United States* v. *Williams*, 538 F.2d 549, 551 (4th Cir. 1976)). One who disclaims any interest in a seized container "thereby disclaims any concern about whether or not the contents of the [container] remain private." *United States* v. *Miller*, 589 F.2d 1117, 1131 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979); see also *United States* v. *Washington*, 677 F.2d 394, 395-396 (4th Cir.), cert. denied, 459 U.S. 854 (1982) (defendant disavowed owner-

ship of suitcase in her possession, claiming that an unidentified man had asked her to retrieve it); *United States* v. *Veatch*, 674 F.2d 1217, 1220-1221 (9th Cir. 1981) (defendant disclaimed ownership of wallet lodged in the back seat of a car in which he had been sitting); *United States* v. *Kendall*, 655 F.2d 199, 200-202 (9th Cir. 1981), cert. denied, 455 U.S. 941 (1982) (defendant disavowed ownership of suitcase, claiming he had picked it up by mistake); *United States* v. *Miller*, 589 F.2d at 1131 (defendant disclaimed ownership of luggage seized from the trunk of his automobile); *United States* v. *Colbert*, 474 F.2d 174, 176-177 (5th Cir. 1973) (en banc) (defendants disclaimed any interest in bags they were carrying); cf. *United States* v. *Jones*, 707 F.2d 1169, 1172-1173 (10th Cir.), cert. denied, 464 U.S. 859 (1983); *United States* v. *Hawkins*, 681 F.2d 1343, 1345-1346 (11th Cir.), cert. denied, 459 U.S. 994 (1982).

The record in the present case shows that petitioner denied knowing either the addressees or the sender of the package, and disavowed any knowledge of the package's contents. He further disclaimed any interest in the package that would authorize him to consent to its search. Moreover, petitioner did not subsequently assert in the district court that he had an ownership interest in the envelope. See *United States* v. *Modica*, 663 F.2d 1173, 1177 (2d Cir. 1981), cert. denied, 456 U.S. 989 (1982). In these circumstances, petitioner lacked any reasonable expectation of privacy in the envelope. He therefore may not contest Agent Davis's search of the envelope.[4]

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[4] Petitioner's claim (Pet. 15) that his privacy interest in the envelope stemmed from an informal bailment relationship was properly rejected by the court of appeals on the ground

2. Petitioner further contends (Pet. 18-20) that the warrantless search of the envelope cannot be justified as a search incident to his arrest, because Agent Davis had exclusive control of the package at the time he arrested petitioner. Of course, a question regarding the propriety of the search would be properly presented here only if petitioner had standing to challenge the search of the envelope; because he lacks standing, there is no need to consider the applicability of the search-incident-to-arrest doctrine. In any event, the search of the envelope plainly qualified as a search incident to arrest.

Petitioner does not dispute that Agent Davis had probable cause to place petitioner under arrest prior to opening the envelope. The record shows that Agent Davis knew that petitioner fit certain characteristics

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that the "evidence [was] not sufficient to support a finding of a contract of bailment, either express or implied" (Pet. App. 26a). There is no reason for this Court to review that factual determination.

Contrary to petitioner's claim (Pet. 15-16), the result below does not conflict with *United States* v. *Freire*, 710 F.2d 1515 (11th Cir. 1983), cert. denied, 465 U.S. 1023 (1984), or *United States* v. *Richards*, 638 F.2d 765 (5th Cir.), cert. denied, 454 U.S. 1097 (1981). In *Freire*, the defendant's briefcase was seized from the trunk of a car driven by a co-defendant. Although the defendant could not contest the search of the car, the court recognized that the defendant had established a privacy interest in the briefcase because he had affirmatively claimed ownership of the briefcase (710 F.2d at 1518-1519). Similarly, in *Richards* a defendant who initially claimed that he had merely picked up a sealed package for a friend was accorded "standing" after he established that he had rented the mail box to which the package was sent and used as an alias the name that appeared on the package as the addressee (638 F.2d at 767-770). Thus, unlike petitioner, the defendants in *Freire* and *Richards* both established ownership interests in the containers that were searched.

of the drug courier profile and was traveling a route frequented by drug couriers; petitioner had purchased a one-way ticket with cash and was carrying no identification other than his ticket; petitioner had gained possession of the envelope under suspicious circumstances; petitioner became evasive as Agent Davis's suspicions focused on the envelope; and the envelope contained a substantial amount of a powdery substance.[5] In those circumstances, Agent Davis had ample probable cause to arrest petitioner and to conduct a search of petitioner's possessions incident to that arrest.

Contrary to petitioner's claim (Pet. 19), the fact that the package already was in Agent Davis's exclusive control at the moment of the arrest does not mean that Agent Davis could not conduct a search of the package. In *New York* v. *Belton*, 453 U.S. 454 (1981), the Court explicitly rejected the same "exclusive control" argument. The Court noted that under such a theory "no search or seizure incident to a lawful custodial arrest would ever be valid" because "by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control'" (*id.* at 461-462 n.5). Thus, in *Belton*, the Court sanctioned the warrantless search of a container as incidental to the defendant's arrest, even though the defendant had already been removed from the vehicle in which the container was found. The courts of appeals also have upheld the validity of searches incident to custodial arrests even though the police officer had already obtained "exclusive control" of the item prior to conducting the search. See, *e.g.*, *United States* v. *Silva*,

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[5] Agent Davis testified that there appeared to be approximately two pounds of powder in the envelope (J.A. 49).

745 F.2d 840, 847 (4th Cir. 1984), cert. denied, 470 U.S. 1031 (1985); *United States* v. *Litman*, 739 F.2d 137, 138-139 (4th Cir. 1984) (en banc); *United States* v. *Porter*, 738 F.2d 622, 627 & n.4 (4th Cir. 1984) (en banc); *United States* v. *Fleming*, 677 F.2d 602, 607-608 (7th Cir. 1982); *United States* v. *Garcia*, 605 F.2d 349, 355-356 (7th Cir. 1979), cert. denied, 446 U.S. 984 (1980). There is no reason for a different result here.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

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[6] This Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), are not to the contrary because "[n]either of those cases involved an arguably valid search incident to a lawful custodial arrest" (*New York* v. *Belton*, 453 U.S. at 461-462). The search in *Chadwick* was not incident to the defendant's arrest, because the search was conducted at the stationhouse more than an hour after the defendant's arrest (433 U.S. at 15). The elements of time and place in *Chadwick* were therefore far different from those here. In *Sanders*, this Court explicitly stated that it did not "consider the constitutionality of searches of luggage incident to the arrest of its possessor" since the State had not urged that theory as a basis for the search (442 U.S. at 764 n.11).

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